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No. 341. October Term, 1897.

Brief of Johnson for Appellee.

IN THE

Supreme Court of the United States.

Filed Feb. 17, 1898.

UNITED STATES, COMPLAINANT,

vs.

THE JOINT TRAFFIC ASSOCIATION *ET AL.*

Brief on behalf of the Pennsylvania Railroad Company, the Allegheny Valley Railway Company, the Philadelphia, Wilmington and Baltimore Railroad Company, the Terre Haute and Indianapolis Railroad Company, the Grand Rapids and Indiana Railroad Company, the Northern Central Railway Company, the Pennsylvania Company, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and the Toledo, Peoria, and Western Railway Company.

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IN THE SUPREME COURT OF THE UNITED STATES.

United States, Complainant,

vs.

The Joint Traffic Association et al.

October Term, 1897.

No. 341.

BRIEF ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY AND OF THE COMPANIES WHO JOINED WITH IT IN THE SAME ANSWER.

Preliminarily, we suggest that the relief demanded by the United States, to the full extent of its claim, cannot be granted, under any possible view of the case, which can be taken. The bill prays for a decree—

"That the said agreement is unlawful, null, and void, and that the defendants, and each and every of them, and their officers, agents, and servants, and each and every of them, be enjoined perpetually from continuing in the combination or association established by the said agreement, and from acting or in any way operating their roads thereunder, either in respect to the provisions of said agreement, by which all the competitive traffic therein described is surrendered to a board of managers, to be divided by said managers among the several companies parties to the agreement, or in respect to the establishment of rates, fares, and charges by said board of managers, or in respect to the division among the several companies parties to said agreement, by said board of managers, of the said rates, fares, and charges for the transportation of the freight and passenger traffic within the scope of said agreement, or in any other respect whatever."

We will endeavor, later, to show there is illegality in none of the purposes of the agreement; but, we doubt not, it will be conceded that most of them are legal. Hereafter, at some

length, we will discuss all the purposes of the agreement; but, in connection with the immediate point with which we are dealing, it is sufficient to recite them.

They are:—

"To aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service."

The United States will hardly contend it was not competent for the railroad companies to enter into an agreement for many of the purposes above stated. Even if this court shall hold that some of them are illegal, it will not do what is prayed by the bill, viz., declare the agreement to be "unlawful, null, and void," nor enjoin the members "from continuing in the combination or association established by the said agreement," nor "from acting or in any way operating their roads thereunder in any respect whatever."

Whilst, if convinced that some of the objects are unlawful, this court will so decree, it will not destroy the association itself nor interfere with such of its purposes as are legal Having made this preliminary suggestion, we will seek to show that no part of the agreement is illegal, but that the association was validly formed for all the purposes enumerated therein.

It is not the intention of this brief in any way to discuss the points so elaborately considered in the opinions filed in the Trans-Missouri case by Mr. Justice Peckham, speaking for the majority of the court, and by Mr. Justice White, speaking for the minority. Further discussion of these vexed questions is left to others.

For the purposes of this argument we will assume it has been forever settled (1) that railroad companies are within the Anti-Trust Act, and (2) that every contract in restraint of trade is by it prohibited.

We maintain that the agreement in the Trans-Missouri case was radically different in most important particulars from that

under which the Joint Traffic Association exists. In the former case there was a combination, for "mutual protection," of companies which agreed, by joint action, to do what, in the arguments addressed to this court by the counsel for the railroad companies, seems to have been admitted to have amounted to a restraint of trade, viz., to establish, and, after establishment, to maintain, rates binding upon all. In the present case the main purpose of the agreement is not to restrain trade, but to bring about certain economies in the expenses of transportation and to prevent the doing of what is condemned as illegal by the Interstate Commerce Act, viz., the making changes in rates either secretly or without proper notice.

Whilst the Anti-Trust Act condemns as illegal, as this court has held, all combinations really in restraint of trade, it does not condemn associations having for their object the prevention of acts made illegal by the Interstate Commerce Act.

There is an obvious distinction between an agreement in restraint of trade and an agreement preventing the doing of what illegally interferes with trade.

Mr. Justice Peckham, speaking for this court, in holding the Trans-Missouri contract illegal, says:—

"Does the agreement restrain trade or commerce in any way so as to be a violation of the Act? We have no doubt that it does. The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local.' To that end the association is formed and a body created, which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force, and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the Act.

"For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it."

In the Trans-Missouri case there was an agreement by several carriers, who combined for their "mutual protection," which delegated the duty imposed upon each to a committee acting for all. It seems to have been admitted by the counsel for the railroad companies in that case that this amounted to a restraint of trade, although they then contended that what they admitted to be in restraint was reasonable and proper.

We urge, preliminarily, in the present case, that the Government must stand upon the agreement as it is written. It is entitled to nothing by virtue of the innuendos and averments of its bill. These were all denied in the answer, as is evident from the following summarization:—

The Pennsylvania Railroad Company and the lines associating with it admitted the execution of the agreement attached to the complaint; that they were common carriers engaged in the transportation of freight and passengers; that they had been and were engaged in active competition, furnishing separate and independent competitive lines of transportation; that they intended to continue; and that they had observed, and intended to observe, the provisions of the Interstate Commerce Act and other laws applicable, and to cooperate with the Interstate Commerce Commission in promoting the observance of the lawful conditions.

In the fourth, fifth, and sixth paragraphs of their answer they said:—

"IV. These defendants admit that on or about the nineteenth day of November, 1895, all the railroad and railway corporations, parties defendant in said bill named, did enter into the agreement, of which a copy, marked 'Exhibit A,' is attached thereto. They aver that said agreement was entered into by the parties thereto for the purposes therein recited, and for none other; that said agreement embodies truthfully, fully, and completely all the undertakings and agreements concerning the matters alleged in the bill into which said railway companies entered; that no other agreement in connection with the subject matter was entered into by or between said companies; and that no purposes or intentions were entertained, or sought to be furthered, by said agreement or deducible therefrom saving those in it recited. These defendants deny all the averments in the bill of unlawful intent, and of an intent to restrain trade and commerce among the several States, and to monopolize the same.

"They were advised by counsel before the making thereof, and still are advised and therefore aver, that the intent and scope of said agreement, and of the parties who made it, was, and is, lawful.

"V. These defendants deny the following specific averments of the bill:—

"1. That said agreement was intended to restrain and prevent competition among the railroads in respect to interstate trade and commerce.

"2. That the railroad companies, parties to said agreement, intended to deprive the public engaged in interstate trade and transportation of the facilities and advantages which the public had theretofore enjoyed from their independent competition.

"3. That said companies intended to establish or maintain rates of freight and passenger transportation fixed arbitrarily, uninfluenced by competition.

"4. That said railroad companies entered into a combination or conspiracy to restrain trade and commerce among the several States.

"5. That said agreement was entered into in order to terminate competition amongst the parties thereto for freight and passenger traffic, and that it did terminate the same.

"6. That the parties to said agreement unlawfully, or in any way otherwise, pooled or combined any portion of their transportation of interstate commerce.

"7. That the parties to said agreement undertook to combine their freight or to divide their earnings, or any portion thereof.

"VI. These defendants deny all the allegations in said bill contained of terms or conditions of said agreement of the 19th of November, 1895, other than those in said agreement contained. They aver that said agreement was the only one entered into by said railroad companies concerning its subject matter, and plead the terms, and the plain meaning thereof, in contradiction of the averments of said bill, that there was some other agreement, and that the agreement entered into was made with any intent or for any purpose not expressed therein."

In the seventh, eighth, ninth, and tenth paragraphs they denied specifically every other material allegation of the Government's complaint, and explained that the action and purposes were consistent with the due observance of the law. In the tenth paragraph they set out the desirability of reasonable rates, and of uniformity and stability therein, to the public. In the eleventh paragraph they averred the continuance of the rates as established by tariffs then on file, and the provision of a method by which, from time to time, they could be modified with due regard to the interests of all concerned, reserving to the boards of directors lawful power to control the

rates to be charged in the future. In the twelfth paragraph they averred that the provisions of the agreement for the termination of through co-operative and commission freight lines resulted solely from the desire to secure economies beneficial to the companies, uniformity and equality in the facilities for transportation, &c. In the thirteenth paragraph they averred that no power was conferred on the board of managers to determine rates for through traffic over competing lines, but only to fix and determine the division of such established rates, &c., earned by the railroad companies which constitute the through lines. In the fourteenth and fifteenth paragraphs they averred that the object of the agreement was to maintain reasonable and just rates, &c., to prevent unjust discrimination, to secure the introduction of economies, and stability and uniformity of rates, which was one of the leading purposes of the Interstate Commerce Act; and that the purposes of the Interstate Commerce Act would be promoted by the carrying out of the agreement. In paragraph 16 they set forth that under the Act to Regulate Commerce they are obliged to conform to its requirements in the matter of publication, posting, filing of schedules, changing of same, establishment of just and reasonable rates, &c., and that concerted action between the carriers is indispensable to the securing of such conformity. In paragraph 17 they denied the existence of the necessary prerequisite action by the Interstate Commerce Commission, or of any request by it that the District Attorney shall institute proceedings. They claimed, therefore, that the proceedings had not been legally instituted. In paragraph 18 they denied that they were engaged in trade or commerce among the several States, or that the agreement, or anything to be accomplished thereunder or to result therefrom, was within the purview of the Anti-Trust Act. In paragraph 19 they denied the right to unite in the same bill causes of action originating by request of the Interstate Commerce Commission under the Interstate Commerce Act and causes of action originating by request of the Attorney-General under the Anti-Trust Act. In answer to the amendment of the Government's bill, they denied, in substance, that the proceedings

set forth in said amendment had been legally sufficient to warrant the institution, maintenance, or prosecution of this suit.

Whilst we concede that if the agreement be illegal it cannot be cured by averments in our answer, we submit that under those averments there can be no condemnation of the agreement unless either it discloses an illegal purpose, or unless it provides illegal means for carrying out a legal one.

In the Trans-Missouri case, the bill was not filed until nearly three years after the agreement had gone into execution. It abounded with complaints of the manner in which the latter had been carried out, as appears by the following extract from the statement of allegations of the bill found in the report of the case at page 299, 166 United States Reports:—

"It was further alleged that the agreement went into effect on the first day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroads the rules and regulations and rates and prices for moving, carrying, and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroad rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and the people of the States and Territories subject to said association, and all persons engaged in trade and commerce within, among, and between the different States and Territories, had been compelled to and were still compelled to pay the arbitrary rates of freight and submit to the arbitrary rules and regulations established and maintained by the association, and ever since that date had been and still were deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and were deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned, and that the trade, traffic, and commerce in such region of country, and the freight traffic in connection therewith, had been and were monopolized and restrained, hindered, injured, and retarded by the defendants by means of and through the instrumentality of such association."

In the present case, it was provided the agreement should not go into operation until the first day of January, 1896,

although it bore date the 19th November, 1895, and had been filed on the twenty-fourth day of December, 1895, with the Interstate Commerce Commission. In pursuance of an intimation received by the United States Attorney for the Southern District of New York prior to the first day of January, 1896, the bill was filed on the eighth day of January, 1896. No action under the agreement, therefore, had been taken antecedently to the filing of the bill, and the case for the Government rests alone upon the alleged invalidity of the same.

In this connection it is not inapt to say that although our agreement by its express provisions went into operation on the 1st of January, 1896, and has been in operation since for a period of more than two years, no word of complaint of injury to shippers or others has come from the United States Government, or from the public through the press or otherwise.

The differing purposes of the two agreements will be best shown by putting what is expressed in each concerning the same in immediate juxtaposition.

In the Trans-Missouri case, as we have seen, the intent expressed was for "mutual protection," to "establish and maintain * * * rates," &c., * * * "on all freight traffic, both through and local." The agreement further provided for the appointment, not with a view to making effectual the provisions of the Interstate Commerce Act, but simply for "mutual protection," of a committee—

> "To establish rates, rules, and regulations on the traffic subject to this association and to consider changes therein, and to make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ, the question at issue shall be referred to the managers of the lines, parties hereto, and if they disagree it shall be arbitrated in the manner provided in Article VII."

In the present agreement, four purposes are declared. Two of these, as we will endeavor to show, are legal and praiseworthy. The third is the one which led, mainly, to the passage of the Interstate Commerce Act. The fourth, though stated generally to be the establishment and maintenance of rates, is limited, by the provisions of the contract, to a main-

tenance of rates established in accordance with law, not by all, in co-operation, but by each, acting alone.

The present agreement thus expresses its purpose:—

"To aid in fulfilling the purposes of the Interstate Commerce Act, to co-operate with each other and adjacent transportation associations, to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service."

By Article VII., which deals with "rates, fares, charges, and rules," it is provided:—

"SECTION 1. The duly published schedules of rates, fares, and charges, and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), are hereby re-affirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges and the rules applicable thereto.

"SEC. 2. The managers shall, from time to time, recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement. No company party hereto shall through any of its officers or agents deviate from or change the rates, fares, charges, or rules herein re-affirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto.

"SEC. 3. The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

The purposes of the present agreement must, under the pleadings, be conclusively taken to be those therein stated. If they do not restrain trade the agreement cannot be held illegal unless, despite the failure so to announce, it provides for the doing of something beyond the purposes expressed. An examination of the agreement, however, establishes the fact that it does not thus provide. The sole question to be determined, therefore, is whether any of its purposes expressed are in restraint of trade.

Two of these purposes are the securing "a reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." It would be a waste of time to endeavor to support the self-evident proposition that these purposes are legal. It is the right and the duty of every transportation company to adopt economies in the way of reduction and concentration of agencies and otherwise. These economies may be adopted solely by its own action, or, if they can be more efficaciously secured in conjunction with others, they may be adopted in concert with them.

Another purpose of the agreement, viz., "fulfilling the purposes of the Interstate Commerce Act" and preventing "unjust discrimination," is, of course, unobjectionable. The main object of the Interstate Commerce Act was "to prevent unjust discrimination." It can scarcely be contended, therefore, that an agreement having for its end the prevention of a discrimination which, because of its hampering trade, was by said Act made illegal, is "in restraint of trade."

We do not deem it necessary to consider the co-operating "with each other and adjacent transportation associations," because such co-operation, apart from the method thereof, is harmless.

Though the remaining purpose of the agreement is said to be "to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic," this must be read in connection with what is provided as to the method of establishment and maintenance.

In the Trans-Missouri contract there was no context control-

ling the expressed purpose of "mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." It provided for the establishment of these rates, not by each of the companies who were parties to the agreement, but by a committee to be created "to establish the rates, rules, and regulations on traffic subject to this association, and to consider changes therein." The directors of the signing companies were deprived of the power to establish rates, which was vested in a foreign body appointed by the combined companies. The purpose of the agreement was to confer upon such foreign body the power to establish rates which it was agreed, after establishment, should be maintained. It was entered into, not for the enforcement of the Interstate Commerce Act, but solely for the "mutual protection" of carriers by maintaining rates to be jointly thereafter established.

Under the present agreement, the rates agreed to be maintained until changed can be established by no body other than the board of directors of each of the several signing companies. At the time of its execution the rates had been established by each of the companies which entered into it and had been duly filed, in accordance with law, with the Interstate Commerce Commission. This establishment, therefore, had resulted from the voluntary action of the respective boards of directors, acting in accordance with law, in pursuance of their respective corporate duties. The rates thus established could not, under the Interstate Commerce law, be changed until after the filing with the Commission of new schedules by way of substitution. Without such filing of new rates, any departure from the old ones would be in violation of law.

It can hardly be contended that an agreement by the signing companies that rates theretofore voluntarily and properly established by each, and duly filed by each, should be maintained until other rates should be voluntarily and legally established and filed, is in restraint of trade so long as an Act of Congress which demands such maintenance shall continue in force. The object of the agreement was to provide machinery

which would secure that maintenance by the companies of the rates which, by the law, were made obligatory until notice. It sought, not to prevent transportation generally, but transportation in an illegal way at illegal rates.

It is true the managers are authorized from time to time to "recommend" such changes in the rates, fares, and charges, previously established by the independent action of the various companies "as may be reasonable, just, and necessary for governing the traffic covered by this agreement," &c., but the directors of each company are left free "to the extent of its interest therein over its own road," by resolution, to "deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers."

The rates, therefore, under the present agreement, unlike those in the Trans-Missouri case, where they were fixed by a foreign body, are those established by each company. There is no requirement of conformity to the changes which may be recommended by the managers. The directors of each company are left free to make changes in the rates theretofore established by them.

In order that we may give to the United States the full benefit of its contention that the rates are to be prescribed by the managers rather than by the railroad companies, we quote the whole of section 2 of Article VII., which reads:—

"SEC. 2. The managers shall from time to time recommend such changes in said rates, fares, charges, and rules as may be reasonable and just, and necessary for governing the traffic covered by this agreement and for protecting the interests of the parties hereto therein, and the failure to observe such recommendations by any party hereto as and when made shall be deemed a violation of this agreement. No company party hereto shall through any of its officers or agents deviate from or change the rates, fares, charges, or rules herein reaffirmed or so recommended by the managers, except by a resolution of its board. The action of such board shall not affect the rates, fares, charges, or rules disapproved except to the extent of its interest therein over its own road. A copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective until thirty days after the receipt of such resolution by the managers. The managers, upon receiving such notice, shall act promptly upon the same for the protection of the parties hereto."

Whilst the first sentence of this section, taken by itself, without its context, might superficially indicate that the recommendations by the managers are to become instantly binding upon all the members of the association, and that being thus binding they cannot be changed until after a resolution by the board of directors, which can become effective only after thirty days' notice, it will be observed that no power is conferred upon the managers to make changes. What is conferred upon them is the right to "recommend" changes. There is a vast difference between a power to "recommend" and a power to "change." A recommendation, in order that it shall become operative, necessarily requires something further to be done, inasmuch as it does not, by itself, effect a change, but merely suggests one. Whilst we have the words, "and the failure to observe such recommendations," &c., "shall be deemed a violation," &c., we can only gather the real intent by reading the whole provision. Certainly a power is reserved to the respective boards of directors to disapprove. The fair construction of the first sentence of the second section is, that the non-observance only of such recommendations as shall be approved, shall amount to a violation of the agreement.

The proper interpretation of the sentence reading, "a copy of the resolution of the board of any company party hereto authorizing any such change shall be immediately forwarded by the company making the same to the managers, and such change shall not become effective," &c., is, that where a change is made of rates originally established or previously recommended and approved, there must be a delay of thirty days, pending notice, before such change shall become effective. Reading it as a whole, as providing for a recommendation by managers and for an approval or disapproval by the respective boards of directors, we find the power reserved to each board to refuse to be bound by rates not by itself established. The second section, therefore, if it stood alone, fairly read, would not warrant the interpretation that the recommendations of the managers of the association become instantly binding. It must be read, however, in

connection with the immediately following third section, which runs thus:—

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto."

The third section makes clear the true meaning of the second, and subjects the powers of the managers of the association to establish rates which, prior to their approval by them, can bind any of the boards of directors to the Interstate Commerce Act and "to all other laws applicable to the subject matter."

No company can be held to have violated the agreement so so as to subject itself to forfeitures thereunder, unless it really has violated it. If it be impossible for the managers *legally* to change rates, without the approval of each board, no changes can be made without such approval, because to direct them would be violative of law. No forfeitures, under the agreement, can be enforced for a refusal to comply with changes not legally made.

Whilst it is true that if the directors of any signing company desire to make changes they can only do so "effectively" after the expiration of thirty days from the receipt of their resolution by the managers, it does not follow that because of the time thus allowed there is a restraint of trade. The Interstate Commerce Act deprives every railroad company of the power to make *instantly* effective, changes in its rates. These can only be made "effectively" after the expiration of a specified time. Preliminary notice is required as a preventative against discrimination through changes unexpectedly made, communicated to one set of shippers and withheld from others. A reasonable notice does not restrain, but promotes, trade. Will this court say that the requirement of thirty days' notice of a change does not aid in the prevention of discrimination, by giving all shippers sufficient warning to make their arrangements accord?

The practical working of the Interstate Commerce Act developed the fact that the time fixed for notice of proposed advances and reduction of rates was too short. What is

known as the "Patterson Bill," being H. R. 3837, was reported, about January, 1896, by a committee for printing. It is understood that in the matter of extended time of notice of changes it embodied a suggestion by some at least of the members of the Commission. In that bill it was proposed that thirty, instead of ten, days' notice of the advances of rates should be given, and that twenty, instead of three, days' notice of reduction thereof should be given. The suggestions under this head will appear from the following quotation from the bill, which will be read with the understanding that the parts between brackets were proposed to be stricken out, and the words printed in small capitals inserted, and also that, with the exception of the words in small capitals, it consists of a quotation from the present law:—

"No advance shall be made in the rates, fares, and charges which have been established and published [as aforesaid] by any SUCH common carrier [in compliance with the requirements of this section] except after [ten] THIRTY days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such public rates, fares, or charges shall only be made after [three] TWENTY days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

"[And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section,]

"It shall be unlawful for [such] ANY common carrier SUBJECT TO THE PROVISIONS OF THIS ACT to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force. * * *

"No advance shall be made in joint rates, fares, and charges shown upon joint tariffs except after [ten] THIRTY days' notice to the Commission which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges except after [three] TWENTY days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or

such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time."

An agreement providing for numerous clearly legal purposes, having for its main purpose the prevention of violations of the Interstate Commerce Act, should not be held illegal, simply because it requires that notice of changes in filed schedule rates shall be given for a length of time sufficient to prevent one set of shippers, through early information, from profiting at the expense of another set.

The requirements of *some* notice of changes in rates is promotive, not restrictive, of trade. There can therefore be no condemnation of the provisions of the present agreement, requiring notice of changes in established rates. If there be any just objection to this provision, it must be on account of the notice prescribed being unreasonably long. There being no averment in the bill of such unreasonableness, this court cannot assume it.

Even if it be held that the requirement of thirty days' notice of changes by the various boards of directors is improper, the agreement will not thereby be rendered illegal; the provision for thirty days' notice alone will fail. A contract which provides merely for the doing of one act must fail, if the act itself be declared illegal by reason of the failure of all reason for its continued existence. A contract, however, to do various things which are performable, will not fail because of provision, *inter alia*, for an act which cannot legally be performed, if it be provided that nothing illegal shall be done thereunder. In such event the contract will stand and the illegal provision will fall.

To bring the present contract within the inhibition of the Anti-Trust Act, it will be necessary to hold that an agreement

to do what is required by the Interstate Commerce Act, viz., to maintain filed schedule rates, restrains trade because of a provision that thirty days' notice of changes in rates shall be given.

In the Trans-Missouri case, the directors of each company were deprived of their power to establish and change rates. Under the present agreement, the directors may change the rates theretofore established by them, with no other restriction saving that the change shall be accompanied by what is deemed necessary notice.

To strike down this agreement, this court must hold the managers to be possessed of an illegal power, although it expressly provides by Article VII., section 3, that no powers are conferred, or shall be exercised, which are violative of law, or of the charter provisions of the signing companies. The powers of the managers are so limited that they are not to be construed as to permit the doing of anything in violation "of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto."

The managers, under the present agreement, are compelled to "co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

Can managers thus forbidden to exercise powers violative of the law, or of the charter requirements of the signing companies, do aught which will be in restraint of trade, especially in view of their duty so to co-operate with the tribunal to which the law has delegated the duty of securing stability and uniformity in rates, fares, and charges, as to bring about such stability and uniformity? It will be observed that the "uniformity" sought to be obtained is the "uniformity" which it is the duty of the Interstate Commerce Commission to secure, viz., "uniformity" of charge by each company to all its shippers under like circumstances.

JOHN G. JOHNSON,
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